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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ALBERTO CAMPOS, Defendant and Appellant.	B166705 (Los Angeles County Super. Ct. No. VA072456)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas I. McKnew, Jr., Judge. Reversed.

Corinne S. Shulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Joseph P. Lee and William H. Davis, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Alberto Campos appeals from his conviction of first degree murder with a special circumstance finding that the murder occurred during the commission of a robbery, burglary, and kidnapping. Defendant contends on appeal that the trial court committed reversible error by admitting inculpatory testimony given by a witness at a previous trial in which other participants in the incident for which defendant is on trial were convicted of first degree murder. He bases this contention on the fact that he was never given the opportunity to cross-examine the witness with regard to those statements. We agree that the defendant was denied his constitutional right to confront the adverse witness and that the error was not harmless, and accordingly we reverse the judgment.

PROCEDURAL BACKGROUND

By amended information filed on February 18, 2003, defendant and his father, codefendant Roberto Campos (Roberto or codefendant), were jointly charged with one count each of residential burglary (Pen. Code, § 459, count 1), first degree residential robbery (§ 211, count 2), kidnapping (§ 207, subd. (a), count 3), and murder (§ 187, subd. (a), count 4). It was further alleged as to all counts that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1). Two special circumstances were charged: that the murder occurred during the commission of a robbery, burglary, and kidnapping (§ 190.2, subd. (a)(17)), and that the murder was for financial gain (§ 190.2, subd. (a)(1)). Defendant and codefendant Roberto pleaded not guilty.

The matter was tried by a jury. Appellant and codefendant were found guilty on all counts. The jury found the robbery, burglary, and murder all to be

first degree, and found the armed principal allegations to be true. The financial gain special circumstance was found to be not true. The jury found to be true that the murder occurred during a burglary, robbery, and kidnapping.

Both defendant and Roberto were sentenced to a term of life without the possibility of parole on the murder count, as well as a fixed determinate term of ten years and eight months. A five-year base term was imposed on count 3 (kidnapping), plus one year for the armed enhancement, and consecutive terms of one-third the base term, or sixteen months, plus one year for the armed enhancement, were imposed on counts 1 (burglary) and 2 (robbery). A one-year enhancement pursuant to section 190.2, subdivision (a)(17) was stayed in accordance with section 654. Appellant was given presentence credit of 265 days in custody, including 231 days of actual custody, plus 34 days good time/work time credit.

Notice of appeal was filed on April 9, 2003.[1]

FACTUAL BACKGROUND

On April 25, 2001, around 5:30 a.m., three armed men, Roman Valdez (Valdez), Gualberto Lopez (Lopez), and David Flores (Flores), broke into the home of Ernesto Campos in South Gate.[2] Ernesto was a drug dealer. The men demanded that Ernesto and his wife, Gloria Meza, give them money and drugs. When they were given neither, they forced Ernesto to get dressed. At one point,

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[1] Codefendant Roberto Campos also filed a notice of appeal, but on October 14, 2003, his appeal was dismissed when he failed to file an opening brief.

[2] Ernesto Campos, the murder victim, was codefendant Roberto's cousin. He will be referred to herein as Ernesto, or as the victim.

Valdez used Ernesto's cell phone to call defendant and codefendant Roberto's home.

Valdez told Lopez and Flores to take Ernesto outside, while Valdez stayed inside. Ernesto apparently struggled with the men, and Lopez shot him. Flores also was shot, and got into the gold Suburban in which the men had arrived. Valdez and Lopez also got into the Suburban and they drove off. Ernesto later died of four gunshot wounds.

Roxanne Rozas, Valdez's girlfriend from March 2000 until June 2001, testified that she heard defendant say to Valdez that someone was scaring, threatening, and harassing his family. Defendant and Valdez wanted to scare a man because of the threat toward defendant's family. Defendant said his dad told him about someone threatening the family.

A week prior to the incident, defendant came to Valdez's house and gave him a couple of guns. A few days before the incident, Valdez's brother, Diego Valdez, heard a conversation between defendant and Valdez in which defendant said that they were going to do payback to someone.[3]

On April 23, 2001, Oscar Rivas (whose wife is Valdez's aunt) had rented a gold Suburban for Valdez. Rivas testified that he and Valdez were driven to the airport car rental agency by a friend of Valdez in a black Suburban. Defendant often drove a black Tahoe truck owned by Roberto. Defendant and Valdez were close friends.

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[3] In May 2000, three armed men had broken into defendant's and Roberto's home. When their demands for money were not met, the men kidnapped defendant and one of defendant's younger brothers, Jorge. Defendant's brother, Joaquin, was also at home. Jorge and defendant were later returned unharmed. Defendant's sister, Gloria Campos, was also present. Gloria has a child fathered by Valdez.

In the late afternoon on the day of the incident, Valdez and some others, including defendant, attempted to clean up Flores's blood from inside the gold Suburban.

Diego Valdez testified that about one week after the incident, defendant drove codefendant Roberto to Valdez's house. Roberto gave Valdez a box. Valdez took the box inside the house and found that it contained over $10,000. Around the same time, Roberto told Flores, with defendant present, that Roberto had given Valdez some money, and said that Flores should get some of that money from Valdez. Six or seven weeks after the incident, defendant was heard arguing with Valdez's mother, saying that he knew Diego Valdez was "talking."

Codefendant Roberto testified that he knew nothing about the incident of April 25, 2001, until after it occurred. He denied telling Valdez to kidnap Ernesto Campos, or paying Valdez any money for any purpose. He said at the time of the incident he was working at See's Candy. He denied that he was a drug dealer.

Defendant testified that he never gave Valdez money to commit any crime. He denied that any guns were thrown off of a pier. He stated he gave Valdez and Rivas a ride to a car rental agency so Valdez could rent a car, but denied any knowledge that the car was to be used in any kind of crime. He said he and Valdez were good friends. He agreed that he received a phone call around 5:30 in the morning, but said by the time he picked it up no one was there. He denied cleaning blood out of the rented Suburban, or participating in any plan to get drugs from the victim.

Valdez's Testimony

1. The Lopez-Flores Trial

Flores and Lopez, who along with Valdez were present at the victim's residence the night of the incident, were tried and convicted of first degree murder

in August 2002. Valdez had pleaded guilty to first degree murder, admitted the murder occurred during the commission of robbery, burglary, and kidnapping, and admitted that he used a handgun in the commission of the crimes. In pleading guilty, it was agreed that if Valdez testified truthfully against Flores and Lopez, as well as defendant and codefendant Roberto, his recommended sentence would be 25 years to life. If he failed to testify truthfully, his sentence would be life without the possibility of parole.

Valdez testified at the Lopez-Flores trial on behalf of the prosecution. He made incriminating statements as to the role of defendant and codefendant Roberto in the April 25 incident. Valdez testified that it was defendant who went with him and Rivas to rent the gold Suburban. He said he rented the vehicle at codefendant's request, and that it was to be used as part of the plan for getting some man to give the names and addresses of the people the man had sent to codefendant's home previously. Codefendant had promised to pay Valdez about $12,000 for doing this. Valdez testified that codefendant gave him one gun and he purchased the other two himself. He, Flores, and Lopez went to the victims' residence; they were supposed to take the victim to an address that codefendant would give them so codefendant could talk to the victim. When Valdez called codefendant using the victim's cell phone, defendant answered the phone. Defendant told Valdez they did not have a place for Valdez to take the victim, so Valdez should take him anywhere and see if he would tell them anything. Valdez said that after the incident, he called codefendant again from his aunt's house, and again spoke to defendant. Valdez told him that everything had gone wrong. Defendant and codefendant came to the aunt's house, and Valdez told them all that happened. Codefendant gave defendant $400, which defendant gave to Valdez to pay for the rental of the gold Suburban. Two days later, defendant called Valdez and told him that defendant and codefendant were coming to his house to give him

money. They came over and codefendant gave Valdez a box containing about $12,000. Two weeks after the incident, Alberto and Valdez drove to the pier in Redondo Beach (in separate cars). Valdez had disassembled the guns used in the incident, and he threw the pieces into the ocean from various places on the pier.

Of course, defendant and codefendant Roberto were not present nor represented by counsel at the Lopez-Flores trial.

2. The Preliminary Hearing in This Case

When called as a witness at the preliminary hearing in the present case, however, Valdez said he did not want to answer any questions. Asked why, he responded, "I don't want to." He was asked if he was at the victim's residence in South Gate on April 25, 2001, and he said, "I'm not answering anything." Asked the same question again, he said, "No." He denied going there in a gold Suburban. He denied knowing Flores, Lopez, defendant, or codefendant. Asked who the father of Roberto's grandchild is, Valdez said, "Me." The prosecutor said, "So do you know him? I mean have you ever met your father-in-law?" Valdez said something inaudible, then the prosecutor asked "What are you doing this for?" Valdez said, "Nothing. I don't want to answer."[4]

The court noted that Valdez had not given a reason for refusing to testify, and saying that he did not want to was not good enough. The prosecutor reminded Valdez that he was looking at life without the possibility of parole, but Valdez persisted in refusing to answer any questions. The court asked Valdez, "Am I to understand, sir, that you wish to take back the agreement that was made?" Valdez

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[4] Clearly the prosecution was surprised by Valdez's sudden refusal to testify, given the prior plea agreement and the fact he testified fully at the Lopez-Flores trial. Valdez had not yet been sentenced.

said, "Yes." The court reiterated the terms of the agreement that if he did not testify he would be sentenced to life without the possibility of parole, and if he did testify truthfully he would get 25 years to life; the court noted that his plea to first degree murder would stand. Valdez replied, "But you also said at any time I could take it back and have my trial." The court said, "No, absolutely not." Valdez again persisted in refusing to answer whether he knew codefendant and defendant. The prosecutor asked if he was scared, and Valdez said, "No." He denied being afraid that codefendant would do something to him or his family. He denied being in Los Angeles County Jail, and denied wearing an orange jumpsuit with "L.A. County Jail" on it. Asked where he was living, Valdez said, "At NCCF." The prosecutor asked if there was any question that he would answer about the incident, and Valdez said, "No." He said "Yes" when asked if he understood the plea agreement, that he was facing life without the possibility of parole, or 25 years to life. The prosecutor indicated he had no further questions.

Defense counsel declined the court's invitation to cross-examine Valdez.

The prosecution then questioned Detective Mark Lillienfeld, the investigating officer in this matter. He testified that he was present at the Lopez-Flores trial and heard Valdez testify as set forth above.

The preliminary hearing proceeded. Off the record, the trial court reviewed the entirety of the trial transcript of Valdez's testimony in the Lopez-Flores trial. The prosecution was then permitted to impeach Valdez by introducing Valdez's incriminating statements as to defendant and codefendant Roberto that he made at the Lopez-Flores trial. The court made the finding that although Valdez answered a few foundational questions at the present preliminary hearing, thereafter he flatly refused to answer. Citing *People v. Green* (1971) 3 Cal.3d 981, the court found that this constituted a refusal to answer and not an inability to recall. Valdez did not invoke his Fifth Amendment privilege. The court noted counsel's objection

that normally under *Green*, each prior question would be put to the witness for an answer. The court found that would be too tedious because it was clear that Valdez would refuse to answer. The court posed a different question: whether it could apply *Green* where there is not an inconsistency in testimony but instead a "flat out refusal." The prosecution argued that refusal to answer amounted to inconsistent testimony.

The prosecutor stated that Detective Lillienfeld was there for defense counsel to cross-examine as to any statements made in the Lopez-Flores trial transcripts that the court had just reviewed, "so they have the opportunity to examine the inconsistent statement." Defense counsel declined to question Detective Lillienfeld.

The court took judicial notice of the plea agreement form executed by Valdez on August 16, 2002 (in Los Angeles Superior Court case number VA065899).

3. The Trial in the Present Case

Valdez refused to testify when called as a witness at defendant and codefendant Roberto's trial. He repeatedly stated, "I'm not answering any questions." Counsel for defendant and codefendant asked if he would answer any questions, and he replied in the negative to both.

After initially ruling to the contrary, thereafter the trial court allowed the prosecution to read to the jury Valdez's prior testimony from the preliminary hearing in this case, including the prior inculpatory statements that Valdez made at the Lopez-Flores trial during his direct testimony (which were admitted during the

preliminary hearing in this case as impeachment).[5] The testimony was admitted over defense counsel's objection that defendant was not present nor represented at the Lopez-Flores trial and never had the opportunity to cross-examine Valdez with regard to the inculpatory statements. In making its ruling, the court cited Evidence Code section 1294.[6]

DISCUSSION

While the present appeal was pending, the United States Supreme Court decided the case of *Crawford v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 1354, 158 L.Ed.2d 177]. In *Crawford*, the Supreme Court overruled *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597], which previously allowed out-of-court statements to be admitted at trial upon a showing of sufficient indicia of reliability. (*Crawford v. Washington, supra,* ___ U.S. at pp. ___ [124 S.Ct. at pp. 1369-1371].)

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[5] The court initially ruled that the Valdez testimony would not be admitted. The court stated, "I believe he virtually took the position at the preliminary hearing that he was not going to testify. You can quarrel that the answers and questions in the negative, but he in essence did not testify."

[6] Evidence Code section 1294 provides: "(a) The following evidence of prior inconsistent statements of a witness properly admitted in a preliminary hearing or trial of the same criminal matter pursuant to Section 1235 is not made inadmissible by the hearsay rule if the witness is unavailable and former testimony of the witness is admitted pursuant to Section 1291: [¶] . . . (2) A transcript, containing the statements, of the preliminary hearing or prior proceeding concerning the same criminal matter. [¶] (b) The party against whom the prior inconsistent statements are offered, at his or her option, may examine or cross-examine any person who testified at the preliminary hearing or prior proceeding as to the prior inconsistent statements of the witness."

The Supreme Court noted that the Constitution's text did not alone resolve the issue before it regarding the requirements of the Confrontation Clause of the Sixth Amendment, and therefore the court turned to the historical background of the Clause to understand its meaning. From a review of the historical record, the court concluded "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford v. Washington, supra,* ___ U.S. at pp. ___ [124 S.Ct. at p. 1365].) The court concluded: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford v. Washington, supra,* ___ U.S. at pp. ___ [124 S.Ct. at p. 1374].)

Respondent argues that defendant did in fact have the opportunity to confront and cross-examine Valdez at defendant's preliminary hearing, but declined to do so. Specifically, respondent contends that Valdez did offer substantive testimony when he denied knowing defendant or codefendant yet acknowledged that codefendant is his child's grandfather, and denied being afraid of retaliation by codefendant. But he also denied that he was wearing an orange jumpsuit. Both the judge at the preliminary hearing and the judge at defendant's trial interpreted Valdez's attitude as one of total evasiveness and recalcitrance. The former characterized it as a "flat out refusal" to testify, and the latter stated that, "he in essence did not testify." His very few substantive answers primarily revealed only that he was no longer willing to cooperate with the prosecution. Thereafter, he persisted over the course of numerous questions in completely refusing to answer. Any attempt at that point by defense counsel to cross-examine him would have been fruitless.

This is a far cry from the factual scenario in *People v. Perez* (2000) 82 Cal.App.4th 760. In *Perez*, when called as a prosecution witness at trial, the witness to a fatal shooting "repeatedly answered 'I don't remember' or 'I don't recall' to virtually all the questions asked her about what she saw the night of the murder and what she told the police. [The investigating police officer] testified that [the witness] told him she was afraid she would be shot if she testified and that she would lie at trial if the prosecution forced her to testify." At trial, the witness's prior statements to the investigating officer describing the crime and identifying appellants were admitted into evidence as prior inconsistent statements pursuant to Evidence Code section 1235. (*People v. Perez, supra,* 82 Cal.App.4th at p. 763.)

On appeal, this court rejected appellant's argument that "the witness's professed inability at trial to testify to the circumstances rendered cross-examination so ineffective that it denied [appellant's] constitutional right to confront the witness." (*Id.* at p. 764.) We noted that the witness testified at length, both under direct examination and cross-examination. "To each of the prosecutor's questions about either what she observed the night of the crime or what she told the police, she answered, 'I don't remember' or 'I don't recall.' She did admit she was reluctant to testify." (*Id.* at p. 766.) On cross-examination, she answered questions relating to bias, denying she was a member of or associated with a gang, denying any romantic interest in the investigating officer, and admitting she did not want to talk to defense counsel. She in fact testified affirmatively that a codefendant was not the person who shot the victim. (*Ibid*.)

In rejecting appellant's argument in *Perez*, we quoted from *United States v. Owens* (1988) 484 U.S. 554 [108 S.Ct. 838, 98 L.Ed.2d 951], in which the Supreme Court stated: "'"'[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'"'" (*Id.* at p. 559

[108 S.Ct. at p. 842], italics added by the *Owens* court.) 'The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee.' (*Id.* at p. 560 [108 S.Ct. at p. 843].)" (*People v. Perez, supra,* 82 Cal.App.4th at p. 765.)

In contrast here, Valdez's testimony was tantamount to a refusal to answer any questions. Certainly by the time defense counsel was offered the opportunity to cross-examine him, Valdez had been steadfastly refusing to answer any questions asked by the prosecution for some period of time. We conclude that defendant had no meaningful opportunity at the preliminary hearing to cross-examine Valdez regarding his testimony at the Lopez-Flores trial.[7] Likewise, when Valdez appeared at defendant's trial, he utterly refused to answer any questions.

Because we conclude that defendant had no opportunity to cross-examine Valdez with regard to his testimony at the Lopez-Flores trial, we find that the trial court erred in permitting Valdez's testimony to be introduced. Regardless of the

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[7] This case is more similar to *People v. Rios* (1985) 163 Cal.App.3d 852, 864-866, in which the witnesses flatly refused to answer any questions at trial, and the prosecution was then permitted to introduce prior statements the witnesses had made to a police detective. The Court of Appeal reversed, in part, because it concluded that the defendant was denied "the right to confrontation which contemplates a meaningful opportunity to cross-examine the witness." (*Id*. at p. 864.) We recognized in *People v. Perez, supra,* 82 Cal.App.4th 760, 766, the existence of *People v. Rios*, and impliedly recognized its validity, but found it distinguishable from the facts then before us. (See *People v. Francis* (1988) 200 Cal.App.3d 579, 588 [witness who flatly refused to answer unavailable under Evid. Code, § 240].)

applicability of Evidence Code section 1294 or any other statutory exception to the hearsay rule, it was error to admit the prior testimony.[8]

When a fundamental constitutional right is denied, a conviction must be overturned unless the reviewing court is able to declare a belief that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) "The *Chapman* standard recognizes that 'certain constitutional errors, no less than other errors, may have been "harmless" in terms of their effect on the factfinding process at trial.' [Citation.]" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 2081, 124 L.Ed.2d 182].) "Consistent with the jury-trial guarantee, the question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. See *Chapman, supra,* 386 U.S., at 24, 87 S.Ct., at 828 (analyzing effect of error on 'verdict obtained'). Harmless-error review looks, we have said, to the basis on which 'the jury *actually rested* its verdict.' *Yates v. Evatt,* 500 U.S. 391, 404, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered--no matter how inescapable the findings to support that verdict

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[8] "That inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands." (*Crawford v. Washington, supra,* ___ U.S. at p. ___ [124 S.Ct. at p. 1372].)

might be--would violate the jury-trial guarantee. [Citations.]" (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 279-280 [113 S.Ct. at pp. 2081-2082].)

On the record before us, we cannot conclude that "the guilty verdict actually rendered in *this* trial was surely unattributable to the error" in admitting Valdez's prior testimony. Outside of Valdez's testimony, the evidence demonstrated that defendant accompanied Valdez to rent the gold Suburban, that he brought some guns to Valdez's house a week prior to the April 25th incident, that he was overheard saying someone was scaring and threatening his family and that he wanted to scare a man because of the threats and was "going to . . . do payback," that in May 2000 armed men broke into defendant's and codefendant's home and attempted to rob them and kidnapped defendant and his young brother, that he was present when the blood was being cleaned up in the gold Suburban, that after the April 25th incident defendant was present when codefendant gave Valdez a box that Valdez did not open in his presence, that codefendant told Flores in defendant's presence that he had given Valdez money and Flores should get some of the money from Valdez, and that defendant was overheard arguing with Valdez's mother that Diego Valdez "was talking."

The evidence against defendant was not insignificant, but Valdez's testimony provided the critical evidence to fit the other pieces of evidence into a coherent whole with regard to defendant's conduct and participation in the charged crimes. We cannot find the error in admitting Valdez's testimony was harmless, and we therefore reverse the judgment. If they are so inclined, the People are entitled to the opportunity to retry defendant and to introduce any evidence which

they arguably refrained from presenting in reliance upon the admissibility of Valdez's prior testimony.[9]

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURRY, J.

We concur:

EPSTEIN, Acting P.J.

HASTINGS, J.

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[9] Given that we are reversing the judgment, we obviously need not discuss the remainder of the contentions raised on appeal by the defendant.